Teamsters Local Union No. 166 (Shank/Balfour Beatty) *and* California Dump Truck Owners Association. Case 31–CE–212

January 26, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On October 1, 1998, Administrative Law Judge Michael D. Stevenson issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, the Respondent filed an answering brief, and the Charging Party filed a reply brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

The General Counsel and the Charging Party have excepted to the judge's recommended Order.[2] They assert that the Order is overly narrow in that it applies only to deliveries to the City Creek Portal of the Inland Feeder Project jobsite. We find merit to these exceptions and grant the remedy sought by the General Counsel.

The record shows that the Inland Feeder Pipeline Project (the Project) is a single construction project involving the construction of an underground water distribution pipeline and tunnel. There are at least two entrances to the site: the City Creek Portal and the Strawberry Creek Portal. Shank/Balfour Beatty, the Employer, was engaged to perform certain excavation work for the Project, which required it to, inter alia, furnish and deliver to the Project jobsite cement water tunnel-support segments (segments) which the Employer would use to shore up the tunnel as the excavation progressed. The segments were cast at a facility owned by Robertson's Ready Mix (Robertson's), located about 4 miles from the Project's City Creek Portal and several miles further away from the Strawberry Creek Portal.[3]

The judge determined that the Employer and the Respondent entered into an unlawful agreement, in violation of Section 8(e), to refrain from using owner-operators to deliver the segments at the Project's City Creek Portal.[4] To remedy the Respondent's unlawful actions, the judge's recommended Order requires the Respondent to cease and desist from entering into, maintaining, reaffirming, giving effect to, invoking, or enforcing such agreements with respect to the delivery of segments from Robertson's to the Project's City Creek Portal. The judge rejected the General Counsel's contention that the order should apply to all segment deliveries to the Project from Robertson's, regardless of which Project entrance was used, because the judge viewed the General Counsel's position as equivalent to a request for a broad cease-and-desist order.

Contrary to the judge, we find that it will effectuate the policies of the Act to prohibit the Respondent from entering into, maintaining, reaffirming, giving effect to, invoking, or enforcing any agreement to refrain from using owner-operators for the delivery of segments from Robertson's to any entrance to the Project.[5] It is true that the agreement found unlawful herein was entered into to resolve a dispute over the manning of the delivery of segments through the City Creek Portal, and that deliveries through the Strawberry Creek Portal were not involved. However, it is clear from the record as a whole that the Respondent's position with respect to the delivery of segments from Robertson's was that the Employer could not use owner-operators to make such deliveries to any location on the Project. Moreover, the logic behind the judge's finding that the agreement not to use owner-operators for segment deliveries from Robertson's to the City Creek Portal violated Section 8(e) would apply with equal force to an agreement not to use owner-operators for deliveries through the Strawberry Creek Portal, as in either case the transportation and delivery of the segments is not jobsite work.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Teamsters Local Union No. 166, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Entering into, maintaining, reaffirming, giving effect to, invoking, or enforcing the terms of the Inland Feeder Project Labor Agreement or any other agreement in which Shank/Balfour Beatty agrees, or has agreed, to

[1] The Respondent's motion to strike the Charging Party's exceptions is denied as lacking in merit.

[2] The judge's recommended Order requires the Respondent to cease and desist from "entering into, maintaining, reaffirming, giving effect to, invoking, or enforcing the terms of the Inland Feeder Project Labor Agreement or any other agreement in which Shank/Balfour Beatty agrees, or has agreed, to cease or refrain from doing business with any other person, including the owner-operators of any vehicle, with respect to the transportation of cement water tunnel-support segments from the Robertson's Ready Mix storage site to the City Creek Portal location and surrounding areas on the Inland Feeder Pipeline Project."

[3] The record does not disclose the exact distance from Robertson's to the Strawberry Creek Portal.

[4] The Respondent has not excepted to that determination.

[5] This limited expansion of the judge's order is not, as the judge stated, equivalent to the issuance of a broad cease-and-desist order. Such orders prohibit a respondent from engaging in unlawful conduct involving any person engaged in commerce. Cf. *Sheet Metal Workers Local 27 (Cahill Monmouth Contracting),* 292 NLRB 1046 (1989) (broad order inappropriate unless respondent shown to have a proclivity to violate the Act). The order herein only applies to agreements between the Respondent and the Employer, and is further limited in its application to agreements involving the delivery of segments from Robertson's to the Project.

cease or refrain from doing business with any other person, including the owner-operator of any vehicle, with respect to the transportation of cement water tunnel-support segments from the Robertson's Ready Mix storage site to any location on the Inland Feeder Pipeline Project."

2. Substitute the following for paragraph 2(a).

"(b) Rescind and render null and void and of no effect any agreement in which Shank/Balfour Beatty agrees or has agreed, to cease or refrain from doing business with any other person, including the owner-operator of any vehicle, with respect to the transportation of cement water tunnel-support segments from the Robertson's Ready Mix storage site to any location on the Inland Feeder Pipeline Project."

3. Substitute the attached notice for that of the administrative law judge.[6]

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT enter into, maintain, reaffirm, give effect to, invoke, or enforce the terms of the Inland Feeder Project Labor Agreement or any other agreement in which Shank/Balfour Beatty agrees, or has agreed, to cease or refrain from doing business with any other person, including the owner-operator of any vehicle, with respect to the transportation of cement water tunnel-support segments from the Robertson's Ready Mix storage site to any location on the Inland Feeder Pipeline Project.

WE WILL rescind and render null and void and of no effect any agreement in which Shank/Balfour Beatty agrees or has agreed, to cease or refrain from doing business with any other person, including the owner-operator of any vehicle, with respect to the transportation of cement water tunnel-support segments from the Robertson's Ready Mix storage site to any location on the Inland Feeder Pipeline Project.

TEAMSTERS LOCAL UNION NO. 166

Ann Cronin-Oizumi, for the General Counsel.
Robert V. Kuenzel, of San Rafael, California, for the Charging Party Employer.
Jeffrey L. Cutler and *Lourdes M. Garcia,* of Encino, California, for Respondent Union.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Los Angeles, California on May 11 and 12, 1998,[1] pursuant to a complaint issued by the Regional Director for the National Labor Relations Board for Region 31 on April 20, 1998, and which is based on charges filed by California Dump Truck Owners Association (the Charging Party or Owners Association) on November 25, 1997, and on February 18, 1998 (first amended charge). The complaint alleges that Teamsters Local Union No. 166 (Respondent) has engaged in certain violations of Section 8(e) of the National Labor Relations Act (the Act).

ISSUE

Whether Respondent violated the Act by entering into and maintaining an agreement with the Employer, Shank/Balfour Beatty, according to the terms of which agreement, the Employer would not do business with nor otherwise use self-employed truck owner-operators to perform certain work, because the owner-operators are independent contractors, and not employees, within the meaning of the Act.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, the Charging Party, and the Respondent.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

THE ALLEGED UNFAIR LABOR PRACTICE

A. Facts (Stipulated)

In a stipulation executed on May 11, 1998 by all parties, it was agreed that Shank/Balfour Beatty (Shank) is now and has been at all times material to this case, a partnership between two California corporations, M. L. Shank Co., Inc., and Balfour Beatty Construction, Inc., and that Shank's office and principal place of business is located in Highland, California (GC Exh. 1(j), par. 3(a)). It was further agreed that within the past calendar year, Shank purchased and received in California, materials and supplies valued in excess of $50,000 either directly from suppliers located outside the State of California or from suppliers who themselves had obtained such materials and supplies directly from outside California (par. 3(b)). Finally, it was agreed that for all times material to this case, Shank was an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act (par. 4).

In the same stipulation, the parties agreed that for all times material to this case, Respondent is a labor organization within the meaning of Section 2(5) of the Act (par. 5), and for the same time period, that Respondent has two officials, Errol Haynes and Robert (Bob) Wiley, who are president and business representative respectively, and who are both agents of Respondent within the meaning of Section 2(13) of the Act (par. 6).

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted By Order Of The National Labor Relations Board" shall read "Posted Pursuant To A Judgment Of The United States Court Of Appeals Enforcing An Order Of The National Labor Relations Board."

[1] All dates herein refer to 1997 unless otherwise indicated.

The stipulation recites other facts relevant and material to this case: the Metropolitan Water District of Southern California (MWD), is engaged in the construction of a water distribution pipeline and water tunnel near San Bernardino, California, called the Inland Feeder Pipeline Project (Project). Parsons Constructors (Parsons) is the project manager for the Project. Construction is now occurring at the City Creek Portal section of the Project (par. 7).

The MWD has subcontracted certain work on the Project to Shank, including certain tunneling work (par. 8).

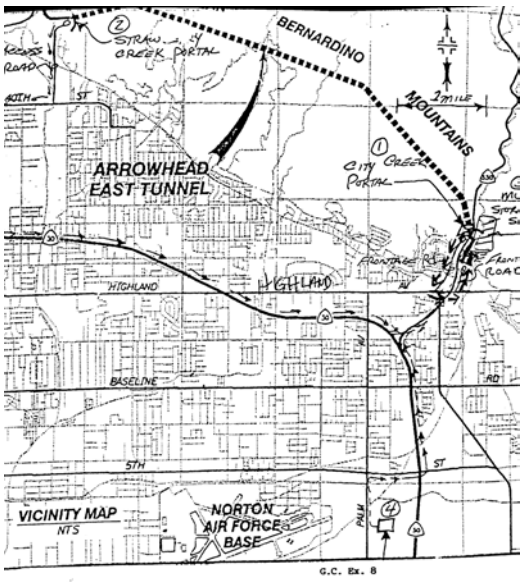
Respondent and various other labor organizations have entered into the Inland Feeder Project Labor Agreement (PLA) (GC Exh. 4), which is effective by its terms from August 1, 1996 through the completion of the project (par. 9).[2] On or about February 7, in a letter to the MWD (GC Exh. 2), Shank agreed to abide by the terms and conditions of the PLA, and to require all of its subcontractors to sign a letter of assent to the PLA (par. 1(o)) (GC Exh. 2).

On or about February 9, 1998, Shank sent a letter (GC Exh. 3) to Respondent which was received by Haynes on or about February 10, 1998 (par. 11).

B. Facts (Nonstipulated)

1.

I will recite the February 9, 1998 letter below, but for now I begin by noting that with perhaps one exception, all remaining significant facts in this case are undisputed. Next, I reproduce a map (GC Exh. 8) that was offered into evidence to assist the reader who may not be familiar with the area of Southern California in issue.



Point 4 on the map designates Robertson's Ready Mix Co. and surrounding yard. This location is approximately 4 miles from City Creek Portal (Point 1 on map) as indicated by the arrows on the map over several different public streets and highways. Other than use of these public thoroughfares, there is no other way for trucks or other vehicles to get to one location from the other and vice versa. However, since the trip from Robertson's to City Creek Portal involves navigating an upward grade of undescribed degree, the trip down is faster, particularly in an empty tractor-trailer which has dropped off a load.

No one from Robertson's testified, but Gerald Stokes, the project manager for Shank (the general contractor on the project in question) and General Counsel's sole witness at hearing, aptly described the role of Robertson's in this case.

In order to build the (6-mile) tunnel referred to above, two problems among others had to be solved: where to put the dirt excavated from the tunnel, and how to shore up the tunnel safely and efficiently. Robertson's played a role in resolving both matters. First, the material taken from the tunnel was separated into topsoil and other dirt. The former was transported from City Creek Portal to the Muck Storage Site (Point 3 on map). Shank arranged for owner-operator truck drivers (independent contractors) to pick up and deposit the topsoil. As the crow flies, the distance from pick up to deposit was about 200 yards. Using available roads, however, the drivers covered a distance of about 1–1½ miles. This operation began in early 1997 with three owner opreators and their trucks furnished by Hernandez Trucking Co., an affirmative action business enterprise which was part of an outreach program.[3] No representative of Hernandez testified, but Stokes described the business as one which both employs truckdrivers and acts as a broker for owner-operators. The owner-operators furnished to Shank by Hernandez Trucking Co., for the haul to the Muck Storage Site were not dispatched from Respondent's hiring hall and not covered by the PLA.

[2] The record contains two PLAs: The one offered by General Counsel is dated August 7, 1996 (GC Exh. 4); the other offered by Respondent is dated August 1, 1996 (R. Exh. 6). Whatever differences which exist between the two versions are not germane to this case.

[3] Hernandez Trucking is a member of the Charging Party.

On or about July 7, Respondent became aware of the Muck Storage Site haul and protested to Shank the use of independent owner-operators for the work. Since Shank claimed the work in question was not covered by the PLA, Respondent filed a grievance on or about July 10 (GC Exh. 5) to resolve that issue. During subsequent meetings in July undertaken to attempt to resolve the grievance, the parties were not successful.[4] However, by September 29, without a referral to arbitration, Shank and Respondent did resolve the matter:

> September 29, 1997
>
> Meeting
>
> In Attendance:
>
> Jerry Stokes–Shank/Balfour Beatty
> Shel Coudray–MWD
> Dick Boyles–PCI
>
> Re: Settlement effort: I.B.T. #166/S/BB Owner-Operator Grievance
>
> A meeting was held with Teamsters Local Union #166 President Errol Haynes, Gary Dixon and Dick Boyles late Friday, September 26th, 1997 in an effort to offset the pending Arbitration regarding Owner-Operators.
>
> After lengthy discussions Errol Haynes offered to settle the grievance filed by Frank Muchow, Mike Shau and Jerry Lowder in a non-precedent setting manner for twelve (12) days pay at the applicable rate to be divided equally among the grievants.
>
> If Shank/Balfour Beatty can agree to this Settlement please sign below.
>
> /s/ Jerry Stokes
> Jerry Stokes *for*
> Shank/Balfour Beatty
>
> Dick A. Boyles *for*
> Parsons Constructors Inc.
>
> /s/ Shel Coudray
> Shel Coudray (witness) *for*
> Metropolitan Water District
>
> /s/ Errol Haynes
> Errol Haynes, President
> Teamsters Local Union #166
>
> (GC Exh. 6)

This settlement resulted in the payment by Shank of about $2000 to Respondent in accord with the stipulated terms. Respondent claimed it settled for much less than was due and owing under the terms of the PLA.

2.

The other dirt excavated from the tunnel was hauled from City Creek Portal to Robertson's which allowed Shank the use of its yard without Shank having to pay the customary dumping fee. In the course of this operation, Shank furnished a bulldozer to move and grade the dumped earth and a water truck to continually spray the area to reduce dust. Both pieces of equipment were operated by Shank employees, covered by the PLA, the bulldozer by an Operating Engineer, and the water truck by a Respondent member. The actual haul itself was performed in July by a combination of nonunion employees of Hernandez and owner-operators also furnished by Hernandez. For this work, Respondent not only didn't claim it, but through its president, Haynes, specifically disavowed any contention that the dumping of dirt at Robertson's yard was covered by the PLA and/or that the owner-operators would have to be employees. On August 6, Stokes sent a letter (GC Exh. 9) to Haynes confirming the above position which Haynes had previously related to Stokes. Haynes did not reply.

In his testimony, as Respondent's witness, Wiley explained Respondent's rationale for not claiming the work involving the dirt haul to Robertson's:

> because it completely went off the site of work. It went outside the boundaries of the right-of-way on the jobsite compared to the Muck disposal site that went . . . 200 yards as the crow flies, but around the block to get it there. That was within the right-of-way of this job.
>
> (Tr. p. 292)

In sum, according to Wiley, the work was simply not within Teamsters jurisdiction (Tr. p. 293).

3.

The dirt dumped into Robertson's from City Creek Portal was transported over a number of local streets shown on the map (GC Exh. 8). The work in issue in this case concerns concrete segments to be used to shore up the tunnel transported on the very same streets for approximately the same distance. There were two differences, the segments were going up to City Creek Portal compared to the dirt coming down, and Respondent claimed the work of driving the tractor-trailers rather than disavowing it.

To shore up the tunnel, Shank decided to use concrete segments, each weighing about 6000 pounds. It takes four segments to shore up 4 lineal feet of tunnel. About 40 percent of the 4000 segments needed has been manufactured thus far. The work is being done in the Robertson's yard on top of the dirt base dumped there from the excavated tunnel. The company doing the work is Coast GEO, a minority owned company, which apparently is unionized. No representative of Coast testified.

The work already done has accumulated in Robertson's yard rather than been transported to City Creek Portal due to certain unforeseen complications in excavating the tunnel and confusion and uncertainty over the pending issue as to whether the work driving the tractor-trailers is covered by the PLA.

Stokes made it clear in his testimony and I find that Shank's intention had been to solicit bids from Hernandez and others for independent contractors to do the work. The "work" involved driving the segments the approximate 4 miles up and driving the empty truck back, and both at Robertson's and at City Creek Portal the driver has to exit the tractor to unlatch the trailer and cause the fifth wheel to come down. The trailer is then left at the location either with the segment on it or empty, depending at which end this "work" is done, and a new trailer is hooked up, again either loaded or empty. The driver's nondriving work at each end takes a minute or slightly more. The work of loading and unloading the trailer and of stabilizing the segment with timber blocks on the trailer is all done either by Shank employees or by Coast GEO employees both unquestionably covered by the PLA.

Stokes testified that it would have been cheaper for Shank to pay the owner-operators the going rate of $46–$55 per hour and have them be responsible for the maintenance, insurance, and other costs of running the tractors as compared to Shank acquir-

[4] In a letter of July 17, to Respondent, Shank claimed it did not violate the PLA and gave reasons in support of its position (CP Exh. 1).

ing a tractor and hiring one or more new employees from Respondent's hiring hall. Shank already owned one or more trailers, which would carry the segments, so these would be furnished to the owner-operators. Before the hearing ended, Stokes reported that Shank could wait no longer, and had arranged to purchase a used tractor to be used in hauling the segments.

Sometime in July, Respondent became aware of Shank's plan to use owner-operators to transport the segments to City Creek Portal and took the position that the work driving the trucks was covered under the PLA. In a series of meetings between Stokes, Wiley, and Haynes, and a representative of Parsons named Gary Dixon, who did not testify, the parties discussed Shank's intention to transport the segments as described above. These meetings, two in July and two in September, ostensibly were for the purpose of resolving Respondent's Muck Disposal grievance, but generally at these meetings, the discussions turned to the planned segment haul from Robertson's yard. Dixon took a strong position at these meetings in support of Respondent's point of view that the work was covered by the PLA. Moreover, Haynes and Wiley both stated repeatedly at these meetings that if Shank decided to implement its plan to use owner-operators, Respondent would file a grievance under the PLA, just like the one they had filed to challenge use of owner-operators for the haul to the Muck Disposal site.

By February, Shank had concluded that it was unwilling to risk hiring the owner-operators it had planned to hire, having the Respondent file its threatened grievance, and perhaps losing the grievance in which case, it would have to pay both Respondent and the owner-operators. Accordingly, on February 9, 1998, Stokes wrote a letter to Haynes, which reads as follows:

> Teamsters, Local 166
> 18597 Valley Blvd.
> Bloomington, CA 92316
>
> Attention: Mr. Errol Haynes, President
>
> Dear Mr. Haynes:
>
> As you know, within the next few weeks Shank/Balfour Beatty ("S/BB") will begin hauling segments from the Robertson's Ready Mix casting yard, over several miles of public roads, to the City Creek Portal on the Arrowhead East Tunnel. This hauling will involve some 4,000 loads.
>
> S/BB had planned to perform this haul using reliable and responsible, self-employed, owner operators who are members of the California Dump Truck Owner's Association.
>
> On February 4, 1998, however, you told me that the union's position had not changed and that all work in connection with hauling the segments is jobsite work; is covered by the Inland Feeder Project Labor Agreement ("PLA"); and that all provisions of the PLA must be applied to any self-employed owner operators performing the work, namely that they must be dispatched by the union, pay union fees and dues, and have trust fund payments made for them.
>
> Of course, this is the same position taken by Parsons Constructors, Inc. ("PCI") and the union in July of last year, when PCI informed S/BB that PCI was a party to, and had negotiated, the PLA, and that the intent of the bargaining parties was that truck owner operators had to be treated as employees. Moreover, since this same time, PCI and the union have agreed and insisted that the length of haul over public roads has nothing to do with whether self-employed truck owner operators must be treated as employees.
>
> In the face of this concerted and unchanged position, mindful of the costs and risks of defending against grievance and arbitration, S/BB has no choice except to agree with the union that the segment haul must be performed under the PLA, and that S/BB will not use self-employed truck owner operators without compelling them to be treated as employees under the PLA.
>
> If this agreement is found to be unlawful, S/BB reserves the right to hire self-employed truck owner operators in accordance with usual industry practice in California, without regard for the PLA.
>
> Very truly yours,
>
> /s/ G.G. Stokes
>
> G.G. Stokes
> Project Manager
>
> (GC Exh. 3)

While Haynes did not respond, Dixon's reply to this letter reads as follows:

> February 12, 1997
>
> Mr. G.G. Stokes
> Project Manager
> Shank/Balfour Beatty
> Arrowhead East Tunnel
> Post Office Box 129
> Highland, California 92346
>
> Dear Mr. Stokes:
>
> I am in receipt of a copy of your letter of February 9, 1998, to Errol Haynes, President, Teamsters Local 166. Please be advised that you have misstated and mischaracterized Parsons constructors' position.
>
> We do not and cannot speak for Teamsters Local 166, but with regard to Parsons' position, the transportation of supplies and/or materials which involves use of public highways rather than exclusively on the construction site (with or without the incidental use of public roads) does not constitute covered work under the Project Labor Agreement. How you intend to carry out the transportation of the segments between "Robertson's Ready Mix Casting Yard" to the "City Creek Portal" is strictly up to you. If the Teamsters believe that such work is covered by the Project Labor Agreement, they may, of course, independently take whatever legal or contractual position and action is available to them.
>
> Sincerely
> /s/ Gary
> Gary D. Dixon, Sr.
>
> (GC Exh. 7)

C. Analysis and Conclusions

1.

I begin by noting the Temporary Injunction Order and Findings of Fact and Conclusions of Law entered by U.S. District

Judge Kim McLane Wardlaw on May 18, 1998, pursuant to Section 10(l) of the Act upon petition of the General Counsel. Section 10(l) of the Act provides district courts with the power to temporarily enjoin unfair labor practices that impinge on the public interest in the free flow of commerce (i.e., strikes and boycotts). *Aguayo v. Tomco Carburetor Co.*, 853 F.2d 744 fn. 2 (9th Cir. 1988). The Order and Findings and Conclusions of J. Wardlaw, attached to General Counsel's brief, do not control the Board's disposition of unfair labor practices charges. *Advertiser's Mfg. Co.*, 280 NLRB 1185, 1186 fn. 3 (1986), and accordingly are noted for background only.

2.

I turn next to Section 8(e) of the Act, which reads in pertinent part as follows:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting or repair of a building, structure, or other work: . . .

In the recent case of *Carpenters (Manufacturing Woodworkers)*, 326 NLRB No. 31, slip op. p. 4 (Aug. 26, 1998), the Board recited "Applicable 8(e) principles."

> Not every collective-bargaining agreement with a "cease doing business" objective that comes literally within the proscription of Section 8(e) is necessarily unlawful. Thus, a union may lawfully require an employer to cease or refrain from doing business with another employer if the union's objective is properly found to be the preservation of work traditionally performed by employees represented by the union.[15] As the Supreme Court has held, Section 8(e) does not prohibit agreements made and maintained for the purpose of pressuring an employer to preserve for its employees work which they have traditionally performed.[16] Rather, the Court said that "[t]he touchstone [of Section 8(e)] is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees" as opposed to being "tactically calculated to satisfy union objectives elsewhere."[17]

[15] *Electrical Workers IBEW Local 46 (Puget Sound NECA)*, 303 NLRB 48, 50 (1991), quoting from *Operating Engineers Local 12 (Griffith Co.)*, 212 NLRB 343, 343–344 (1974), enf. denied 545 F.2d 1194 (9th Cir. 1976), cert. denied 434 US 854 (1977).

[16] *National Woodwork Mfrs. Assn. v. NLRB*, 386 US 612, 635 (1967).

[17] Id. at 645; *Associated General Contractors*, 280 NLRB 698, 701 (1986) (the focus of the analysis is whether the disputed clause has the primary purchase of protecting unit work or unit standards, or the secondary purpose of promoting broader goals of the union by asserting control over the labor relations of other employers).

In light of the above, I turn to the central question of whether Shank and Respondent entered into an agreement within the meaning of Section 8(e). The General Counsel addresses this question at some length in her brief, pages 7–13, contending that there was indeed an agreement. Respondent asserts in its brief, page 6, "for a violation of Section 8(e) of the Act to be found in the construction industry, parties must have entered into an agreement that has a secondary effect on offsite work. Shank and the Union did not enter into an agreement pursuant to Section 8(e) of the Act."

I find that the parties did indeed enter into an agreement and I place reliance on Shank's letter of February 9 to Respondent (GC Exh. 3), recited above, particularly the final two paragraphs. There is no issue regarding Respondent's receipt of the letter and its failure to disavow, clarify, or otherwise respond constitutes an admission by silence, because if there were no agreement, Respondent would reasonably be expected to deny same. *Coca-Cola Bottling Co.*, 313 NLRB 1197, 1200 (1994), citing Jones, *Evidence* p. 524 (6th ed. 1972).[5]

The conclusion I reach above is reinforced by my credibility findings in the Facts. Thus I find that Haynes and Wiley had not only claimed the segment haul at various times in July and September at meetings held to resolve a grievance regarding the Muck Site haul, but that Respondent's representatives had also threatened to file a grievance in furtherance of their claim. I specifically discredit and do not believe the testimony of Haynes wherein he testified that he told Stokes on February 4, 1998, merely "that we claim all Teamsters work covered by the PLA." On cross-examination, Haynes added that he did not "claim the segment haul from Robertson's since it hadn't started yet." This ignores the context of the entire issue including the two other hauls described above. At page 323 of the transcript, Haynes admitted that he told Stokes specifically that Respondent didn't claim the dirt haul to Robertson's. Am I to believe that Haynes would speak clearly on this point and vaguely on the segment haul, leaving to Stokes to interpret his meaning. I don't believe it. Based on my view of his demeanor, Haynes was not the kind of man to speak in riddles. In addition, Haynes' testimony is contrary to what Stokes recited in the letter of February 9, 1998 (GC Exh. 3), a letter which Haynes never disputed.

So I find that Shank and Respondent entered into an agreement and that the agreement constituted a secondary boycott because rather than preserving work traditionally done by bargaining unit employees, it seeks to acquire work not traditionally done by those employees. Thus, the facts of the instant case show that the hauling of dirt to Robertson's was not done by bargaining unit employees, but was done by independent owner-operators and by nonunion employees of Hernandez Trucking. The hauling of segments from Robertson's to City Creek Portal can look to the dirt haul and other surrounding circumstances to establish the proposition that the agreement between Shank and Respondent was work-acquisitive in nature.

[5] I note the case of *Sheet Metal Workers Local 27*, 321 NLRB 540, fn. 3 (1996), where the Board pointed out "that, as a matter of law, *solely unilateral* conduct by a union, for example, a threat of picketing or the mere filing of a grievance, to enforce an unlawful interpretation of a facially lawful contract clause does not violate Sec. 8(e) because such conduct does not constitute an 'agreement.' (Citations omitted.) Unilateral conduct of this kind, however, may violate other provisions of the Act." In the present case, I find that there is a great deal more present than solely unilateral conduct by a union.

See *Marrowbone Development Co. v. District 17,* 147 F.3d 296, 300–304 (4th Cir. 1998); *Retail Clerks Local 770 (Hughes Markets)*, 218 NLRB 680, 682–683 (1975).

3.

The construction industry proviso is of no help to Respondent. All agree that the City Creek Portal area where the segments are delivered is a construction jobsite. However, in *Operating Engineers Local 12 (Stief Co.)*, 314 NLRB 874, 877 (1994), the Board stated that:

> [B]ased on the legislative history of the proviso to Section 8(e), the Board has found that the proviso does not apply to various types of transportation work. See *Joint Council of Teamsters No. 42 (AGC of California)*, 248 NLRB 808 (1980), enfd. sub nom. *Teamsters Joint Council No. 42 v. NLRB (California Dump Truck Owners Assn.)*, 671 F.2d 305 (9th Cir. 1981), amended 702 F.2d 168 (9th Cir. 1981), cert. denied 464 US 827 (1983).[4] Thus, the Board has found that the mixing, delivery, and pouring of ready-mix concrete,[5] the delivery of precast concrete pipe,[6] the transportation of tools, materials, and personnel to and from a construction site,[7] the delivery of sand fill,[8] and the haulage of waste[9] are not jobsite work.

[4] As the Board recognized in Teamsters No. 42 (AGC of California), the legislative history of Sec. 8(e) reveals that a primary motivation for the enactment of the proviso was the desire to "prevent potential labor strife between union and nonunion personnel working at the same jobsite." Id. at 815. Thus, these concerns are not implicated by the temporary presence on the jobsite of delivery personnel. Id.

[5] *Teamsters Local 294 (Island Dock Lumber),* 145 NLRB 484 (1963), enfd. 342 F.2d 18 (2d Cir. 1965).

[6] *Joint Council of Teamsters No. 42 (Inland Concrete Enterprises),* 225 NLRB 209 (1976).

[7] *Teamsters Local 282 (D. Fortunato, Inc.),* 197 NLRB 673 (1972).

[8] *Teamsters Local 294 (Rexford Sand & Gravel),* 195 NLRB 378 (1972).

[9] *Teamsters No. 42 (AGC of California*), supra, 248 NLRB at 817.

Based on the above authorities, I find that the construction industry proviso does not apply here because the transportation of the segments from Robertson's to City Creek Portal was not jobsite work.[6] See also *General Truck Drivers Local 957 v. NLRB*, 934 F.2d 732, 736–738 (6th Cir. 1991), citing at page 738, *Joint Council of Teamsters No. 42 v. NLRB*, 702 F.2d 168 (9th Cir. 1981), cert. denied 464 US 827 (1983). In *Joint Council of Teamsters*, a master labor agreement between unions and employers in California construction industry prohibited general contractors from hiring nonunion dump truck owner-operators. The Board found the agreement to be an unfair labor practice in violation of Section 8(e). The court in *General Truck Drivers* agreed with the *Joint Council* decision that independent truckers who spend 90 percent of their time driving are not onsite workers.

The independent contractors who would have done the segment haul from Robertson's would have spent the great majority of their time driving between the two locations and just a few minutes at each location bringing down the 5th wheel of the trailer and unlatching the tractor. This is not onsite work.

[6] Jobsite work is work to be done at the site of construction such as alteration, painting or repairs of a building, structure or other work. *District Council of Carpenters (Cardinal Industries)*, 136 NLRB 977 (1962), p. 988 of J.D.

4.

I have considered Respondent's authorities, *Dairy Employees Local 454*, 210 NLRB 483 (1974) and *Local Freight Drivers Local 208*, 224 NLRB 1116 (1976), cited respectively at pages 7 and 8 of the brief, and find them to be distinguishable on their facts. Respondent's argument at pages 10–12 of its brief, that Shank is attempting to avoid the Union's contractual right to file grievances is without merit. Respondent does not explain why a union or any other entity would have a right to file a grievance to achieve an unlawful objective, i.e., the awarding of offsite work to bargaining unit employees (secondary objective), thereby defeating Shank's right to award the work to owner-operators as it had intended. In fact, filing a grievance under certain circumstances may itself violate Section 8(e) of the Act. See *Carpenters Local 745 (SC Pacific)*, 312 NLRB 903 (1993); *Elevator Constructors (Long Elevator)*, 289 NLRB 1095 (1988).[7]

5.

I end my analysis as I began it, by noting again that neither I nor the Board is bound by the Order and Findings of the U.S. District Judge in the 10(l) proceeding. Yet, the General Counsel contends, brief, page 16, that "the Region has concluded that the remedy herein should require Respondent, "to cease-and-desist from its violation of Section 8(e) in the same manner as that required by the District Court's injunction." The General Counsel correctly assumes in her brief that Respondent would propose in its brief, narrower language for the Board to adopt than that contained in the District Court's injunction.

To be more specific, the U.S. District Judge's cease-and-desist order covers "the transportation of cement water tunnel-support segments from the Robertson's Ready Mix storage site to any location on the Inland Pipeline Project." Respondent asks me and the Board to modify the Court's cease-and-desist order to read, "from Robertson's Ready Mix storage site to City Creek Portal." In support of this proposed modification, Respondent states, brief, page 13, "Any broader . . . remedy risks encroaching upon the Union's lawful right to claim work [and] . . . would limit the Union's right to pursue grievances over work which it believes is on site."

The General Counsel's request is equivalent to a broad cease-and-desist order in other types of cases. In general, entitlement to a broad order must be based on a Respondent's proclivity to violate the Act, established either by the facts within a particular case, or by prior Board decisions against the Respondent at bar based upon similar unlawful conduct in the past. *Sheet Metal Workers Local 27 (CAMCON)*, 292 NLRB 1046 (1989) (Judge's broad cease-and-desist order reversed on grounds that animosity between Respondent and another union local, and Respondent's intent to prevent members of the other local from working in its jurisdiction not adequate to support broad order).

In the instant case, as in *Sheet Metal Workers Local 27*, the General Counsel does not cite any prior Board decisions against Respondent based on similar conduct. To establish proclivity for unlawful conduct in the present case, the General Counsel

[7] The General Counsel does not allege that Respondent's threats to file a grievance, if Shank allowed owner-operators to perform the segment haul, were unlawful, and I express no opinion on the matter.

states, brief, page 18, that narrower language than that contained in the District Court's injunction [would be] "inadequate because it would not remedy clearly similar, future potential violations of 8(e) by Respondent at the Inland Feeder Pipeline Project . . . other than those violations that specifically involve the City Creek Portal and Strawberry Creek Portal locations."

I reject the General Counsel's request because there is no showing of any proclivity to violate the Act. Compare *Teamsters Local 294 (Island Dock Lumber)*, 145 NLRB 484, 493 (1963). In fact, Respondent's failure to claim the dirt haul to Robertson's was an inconsistent position I used against Respondent in part to find the violation. But with respect to the Remedy, said position helps Respondent to refute any claim of proclivity to violate the Act. Moreover, the General Counsel's argument asks me to rely on speculation and surmise about what Respondent might do in the future, to impose a broad order. The effect of such argument, if adopted, would be to nullify the difference between a narrow and broad order. That is, the General Counsel's argument could be made in every case to support a request for a broad cease-and-desist order. Finally, it is most unlikely that future violations would occur on this project because, assuming this decision survives appeal, Shank, the general contractor, is likely to resist any agreement with Respondent to cease doing business with any third party, including owner-operators of vehicles. That is, Shank's chances of prevailing in any grievance over worksite issues is manifestly improved as a result of this decision.[8]

D. The Effect of the Unfair Labor Practices on Commerce

The activities of Respondent set forth in sections A–C, above, occurring in connection with the operations of the Employer, described in section A, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Shank/Balfour Beatty is a partnership between two California corporations, and at all times material has been an employer engaged in commerce and in business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Local Union No. 166, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

3. By entering into, maintaining, reaffirming, giving effect to, invoking, or enforcing the terms of the Inland Feeder Project Labor Agreement or any other agreement in which Shank/Balfour Beatty agrees, or has agreed, to cease or refrain from doing business with any other person, including the owner-operators of any vehicle, with respect to the transportation of cement water tunnel-support segments from the Robertson's Ready Mix storage site to the City Creek Portal location and surrounding areas on the Inland Feeder Pipeline Project, Respondent has violated Section 8(e) of the Act.

4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[8] Again, I express no opinion on whether the future filing of a grievance by Respondent to enforce worksite issues would violate the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(e) of the Act, it will be recommended that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act. It will also be recommended that Respondent rescind and render null and void and of no effect the agreement of on or about February 10, 1998, by which Shank/Balfour Beatty agrees, or has agreed to cease and desist or refrain from doing business with any other person, including the owner-operator of any vehicle, with respect to the transportation of cement water tunnel support segments from the Robertson's Ready Mix storage site to the City Creek Portal location on the Inland Feeder Pipeline Project.

On the basis of the foregoing findings of fact and conclusions of law, and on the entire record, and pursuant to Section 10(c) of the Act, I make the following recommended[9]

ORDER

The Respondent, Teamsters Local Union No. 166, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, their respective officers, agents, and representatives, shall

1. Cease and desist from

(a) Entering into, maintaining, reaffirming, giving effect to, invoking, or enforcing the terms of the Inland Feeder Project Labor Agreement or any other agreement in which Shank/Balfour Beatty agrees, or has agreed, to cease or refrain from doing business with any other person, including the owner-operators of any vehicle, with respect to the transportation of cement water tunnel-support segments from the Robertson's Ready Mix storage site to the City Creek Portal location and surrounding areas on the Inland Feeder Pipeline Project.

2. Take the following affirmative action which it is found will effectuate the policies of the Act.

(a) Rescind and render null and void and of no effect any agreement in which Shank/Balfour Beatty agrees or has agreed, to cease or refrain from doing business with any other person, including the owner-operators of any vehicle, with respect to the transportation of cement water tunnel-support segments from the Robertson's Ready Mix storage site to the City Creek Portal location and surrounding areas on the Inland Feeder Pipeline Project.

(b) Within 14 days after service by the Region, post at its union office and other places where it customarily posts notices to members in California, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 25, 1997.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL not enter into, maintain, reaffirm, give effect to, invoke, or enforce the terms of the Inland Feeder Project labor Agreement, or any other agreement in which Shank/Balfour Beatty agrees or has agreed, to cease or refrain from doing business with any other persons, including the owner-operators of any vehicle, with respect to the transportation of cement water tunnel-support segments from the Robertson's Ready Mix storage site to the City Creek Portal location and surrounding areas on the Inland Feeder Pipeline Project.

WE WILL rescind and render null and void and of no effect any agreement by which Shank/Balfour Beatty agrees or has agreed, to cease or refrain from doing business with any other persons, includidng the owner-operastors of any vehicle, with respect to the transportation of cement water tunnel-suport segments from the Robertson's Ready Mix storage site to the City Creek Portal location and surrounding areas on the Inland Feeder Pipeline Project.

TEAMSTERS LOCAL UNION NO. 166, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA